Supreme Court, U.S.
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NO. _____

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

LLOYD HARRIS, JR.
Petitioner
v.

PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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I.

QUESTIONS PRESENTED FOR REVIEW

1. A. DID THE AUTHORIZATION BY THE PENNSYLVANIA LEGISLATURE IN THE DRUG, DEVICE AND COSMETIC ACT PERMITTING THE SECRETARY OF HEALTH TO ADD CONTROLLED SUBSTANCES BY REGULATION CONSTITUTE A DENIAL OF DUE PROCESS?

B. DID THE AUTHORIZATION BY THE PENNSYLVANIA LEGISLATURE IN THE DRUG, DEVICE AND COSMETIC ACT PERMITTING THE SECRETARY OF HEALTH TO ADD CONTROLLED SUBSTANCES BY REGULATION CONSTITUTE AN UNCONSTITUTIONAL DELEGATION OF AUTHORITY?

2. IS PHENYLACETONE A CONTROLLED SUBSTANCE WITHIN THE MEANING OF THE CONTROLLED SUBSTANCE DRUG, DEVICE AND COSMETIC ACT?

3. DID SUFFICIENT PROBABLE CAUSE EXIST TO SUPPORT THE ISSUANCE OF THE SEARCH WARRANT OBTAINED FOR AND EXECUTED ON THE DEFENDANT'S RESIDENCE?

4. WERE THE STATEMENTS ELICITED FROM THE DEFENDANT THE PRODUCT OF DURESS AND COERCION AND THUS INADMISSIBLE AT THE DEFENDANT'S TRIAL?

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IV.

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The Supreme Court of Pennsylvania denied allowance of appeal by a memorandum order that was not reported. It was filed on March 10, 1992 and is reproduced in the appendix (App. A).

The Pennsylvania Superior Court issued an opinion which was entered at No. J. A29015/91. Commonwealth v. Harris, (00664HBG90) 599 A.2d 700 (1991); dissenting opinion filed by Popovich, J. (App. B).

The Opinion of Adams County Court of Common Pleas, dated April 6, 1990, was entered at CC-377-87. (App. C).

V.

STATEMENT OF THE GROUNDS WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Pennsylvania Supreme Court entered a final judgement on this matter on March 10, 1992.

Title 28 of the United States Code, Section 1257, "where the validity of a treaty or statute of the United States is drawn in question or when the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948 C. 646, 62 Stat. 929, confers jurisdiction upon the

United States Supreme Court to review the judgement of the Pennsylvania Supreme Court by Writ of Certiorari.

VI.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Pennsylvania Constitution Article I, Section 8

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Pennsylvania Constitution Article II, Section 1

The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.

Pennsylvania Constitution Article III, Section 1

No law shall be passed except by bill, and no bill shall be so altered or amended, on its passage through either House, as to change its original purpose.

35 P.S. § 780-103

The secretary shall control all substances listed in Schedule I through V of this act and may, by regulation, upon his own motion or on the petition of any interested party, add a substance as a controlled substance. Such regulations shall be adopted in accordance with the act of July 31, 1968 (P.L. 769), known as the "Commonwealth Documents Law." Before so doing, the secretary shall request the advice in writing from the board whether a substance should be added as a controlled

substance. Such advice shall be rendered to the secretary within a reasonable time. The secretary shall consider with respect to each substance hereafter controlled:

(1) Its actual or relative potential for abuse;

(2) Scientific evidence of its pharmacological effect, if known;

(3) State of current scientific knowledge regarding the substance;

(4) Its history and current pattern of abuse;

(5) The scope, duration, and significance of abuse;

(6) The risk there is to the public health;

(7) Its psychic or physiological dependence liability;

(8) Whether the substance is controlled under Federal law; and

(9) Whether the substance is an immediate precursor of a substance already controlled under this section.

After considering the above factors, the secretary shall make findings with respect thereto and shall issue a regulation controlling the substance if he finds that the substance has a potential for abuse.

35 P.S. § 780-103 (b)

If the secretary designates a substance as an immediate precursor, substances which are precursors of the controlled precursor shall not be subject to control solely because

they are precursors of the controlled precursor.

35 P.S. § 780-104

See full text in Appendix "E". Pertinent reference made on page 18.

Article XIV of the Constitution of the United States

Section 1. .....; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VII.

STATEMENT OF THE CASE

The present post-verdict appeal arises following the trial in Commonwealth of Pennsylvania vs. Lloyd Bernard Harris, CC-377-87, Adams County Court of Common Pleas. The factual and procedural history of the case follows:

In 1979, Trooper Mervin Hill became involved in an investigation of methamphetamine dealers and manufacturers in which the Defendant was a suspect. (N.T. Trial lis 25-26); (Probable Cause Affidavit for Search Warrant p. 2.) In 1984, approximately five years after the Defendant was suspected as a methamphetamine dealer or manufacturer, he purchased various chemicals and chemical-

related products at the Bowman Mel Chemical Company. (N.T. Trial 53-54, 55); (Probable Cause Affidavit for Search Warrant p.1). Aside from purchases made in 1984, there were also purchases from Bowman Mel Chemical Company in 1985, 1986, and 1987. (N.T. Trial 53-54, 55); (Probable Cause Affidavit for Search Warrant p. 1). Despite the frequency of the Defendant's purchases, none of the items bought by the Defendant were illegal. (N.T. Trial 57).

On July 24 and 25, 1987, the State Troopers surveiling the Defendant's residence, noticed the Defendant leave his home and walk to an outer building on the premises. (Probable Cause Affidavit for Search Warrant p. 2). The surveiling officers observed this activity (e.g., the outer building) on more than one occasion. (Probable Cause Affidavit for Search

Warrant p. 2). The only other suspicious conduct attributable to the Defendant was that he carried a garden hose to the outer building. (Probable Cause Affidavit for Search Warrant p. 2).

Based on the foregoing information, Trooper Hill requested, and obtained, a search warrant from District Justice Thomas Carr, (N.T. Suppression Hearing 21). And, on July 25, 1987, at 7:20 a.m., Trooper Hill, along with Troopers Fritz, Fenstermacher, Stone, Wilson, Brou, and Helwig, executed the search warrant at the Defendant's residence on Pondtown Road, Dillsburg, Pennsylvania. During the execution of the warrant, the Defendant was apprehended as he exited the outer building. (N.T. Trial 29). Once inside this building, the troopers discovered a three-necked flask, various chemicals, i.e. phenylacetone, formaldehyde,

hydrochloric acid, a yellow substance-phenyl nitro propylene, iron filings, a blackboard with a chemical formula for phenyl nitro propylene, a triple beam scale, and coffee filters. (N.T. Trial 29, 34, 39, 41, 44, 46, 63, 64-65). With the exception of the phenylacetone,[1] all the items seized were legal. (N.T. 72).

As a result of the discovery of the afore-noted items, the Defendant and his wife were interrogated regarding the items seized during the search. (N.T. Trial 42). In the course of the interrogation,

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[1] It should be noted that in the controlling statute, Drug Device and Cosmetic Act and, in particular, in the section of the Act outlining the proscribed substances, there is no mention made of phenylacetone. The proscription is contained in a book of regulations, the Pennsylvania Code 28 Pa. Code Ch. 5 (1981) as additional proscribed substances by order of the Department of Health, not the legislature.

a discussion occurred between the officers and Mrs. Harris as to what would happen to her children were she and her husband arrested. See (Order of Court, The Honorable Oscar F. Spicer, Findings of Fact, Suppression Hearing Appendix D). Following this discussion, Mrs. Harris pleaded with the Defendant to cooperate. See (Order of Court, The Honorable Oscar F. Spicer, Findings of Fact, Suppression Hearing Appendix D). Thereafter, the Defendant told the troopers that:

> Ken Conley liked to get high, and Ken Conley would bring chemicals over to him, and he would manufacture the controlled substances, mainly amphetamine, and at which time Ken Conley would come over, after he had finished the process of making the drug, and therefore receive payment in drugs, for Mr. Conley bringing the chemicals over.

(N.T. Trial 42; See also N.T. Suppression Hearing Appendix D 27). After his arrest,

the Defendant spoke to Trooper Fenstermacher at the Adams County Prison. (N.T. Trial 83). At that point in time, the Defendant admitted that the chemicals seized at his residence were his. (N.T. Trial 83).

On August 17, 1987, the Defendant and his wife had a preliminary hearing before District Justice John C. Zepp on the offenses of unlawful possession of a controlled substance with intent to deliver and criminal conspiracy. After listening to the testimony of Trooper Hill, District Justice Zepp found prima facie evidence on the offenses of unlawful possession of phenylacetone with intent to manufacture and criminal conspiracy. Both cases were bound over for disposition in the Adams County Court of Common Pleas.

As a result of the Defendant's pre-trial motions to suppress and for

dismissal of the criminal information, a pre-trial hearing was held before The Honorable Oscar Spicer on March 28, 1988. Although Trooper Hill testified at that hearing regarding the probable cause to search and the nature of the interrogation of the Defendant, the hearing was concluded when the Defendant indicated his intention to enter a plea of guilty pursuant to a negotiated plea agreement. (N.T. Suppression Hearing 35). Despite the abbreviated nature of the hearing, Judge Spicer issued an Order setting forth his findings of fact and conclusions of law.

There was a pre-trial ruling on the sufficiency of the probable cause set forth in the search warrant, where the trial Court found the probable cause sufficient on a "totality of the circumstances" analysis. (N.T. Trial 24).

Thereafter, on May 17, 1988, the Defendant proceeded with a trial by Judge before This Honorable Court. The Commonwealth called four witnesses during the trial.

Initially, the Commonwealth called Trooper Hill who related the afore-described events surrounding the search and seizure at the Defendant's residence. Trooper Hill also opined that the outer building was a laboratory for the manufacture of P2P. (N.T. Trial 46). It should be noted that no P2P was found on the premises and that at least two more steps of processing would have had to occur before any P2P could be produced. (N.T. Trial 80). The Commonwealth then called Susan Polage, an employee of the Bowman Mel Company, who related that the Defendant had purchased a number of chemical supplies during the past few years and that those supplies were all

legal. (N.T. Trial lis 56-57). The next Commonwealth witness was Paul S. Gipe, a State Police chemist. Mr. Gipe testified that acetone is a cleaning agent for glassware and that the equipment at the Defendant's outer building was consistent with the manufacture with phenylacetone. (N.T. Trial lis 61, 19). The final witness for the Commonwealth, Trooper Fenstermacher, testified regarding the surveillance of the Defendant's residence and a statement made by the Defendant at the Adams County Prison regarding ownership of the chemicals found at the Defendant's residence. (N.T. Trial lis 82, 83). No defense testimony was presented.

Following the presentation of evidence, This Honorable Court found the Defendant guilty. Timely post-verdict motions were filed by the Defendant,

subsequently denied, and Defendant was sentenced on September 19, 1990. The Defendant filed an Appeal to the Superior Court of Pennsylvania on January 14, 1991. On June 11, 1991 an oral argument was presented on the Appeal. The Superior Court Memorandum Opinion was filed August 29, 1991, by a divided Court affirming the judgements. Thereafter, timely petition for Allocatur was filed with the Pennsylvania Supreme Court who, by Memorandum dated March 10, 1992 denied Allocatur. This appeal followed.

VIII.

REASONS RELIED UPON FOR ALLOWANCE OF APPEAL

1. A.

DID THE AUTHORIZATION BY THE PENNSYLVANIA LEGISLATURE IN THE DRUG, DEVICE AND COSMETIC ACT PERMITTING THE SECRETARY OF HEALTH TO ADD CONTROLLED SUBSTANCES BY REGULATION CONSTITUTE A DENIAL OF DUE PROCESS?

In Commonwealth v. Harris, (00664HBG90) 599 A.2d 700 (1991), the Pennsylvania Supreme Court's holding affirmed a standard that is both confusing to the public and representative of an unconstitutional delegation of authority. Recently, the Pennsylvania Appellate Courts, in a series of opinions regarding license suspension for refusals to take chemical tests, prohibited the imposition of suspension in cases where the citizenry was confused.[2] Specifically, where a

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[2] Commonwealth Dept. of Transportation, Bureau of Traffic Safety, v. O'Connell, 555 A. 2d 873, 521 Pa 242 (1989)

defendant is confused as to his right to a lawyer in such instances', the Court will not allow the individual's license to be suspended. The Pennsylvania Supreme Court held in the leading case referenced in footnote 2 below, (O'Connell):

> Since the course of conduct of the police creates the confusion in these cases, it is appropriate to place the duty on them to clarify the extent of the right of counsel when asking arrestees to take breathalyzer tests thereby insuring that those arrestees who indicate their confusion over their Miranda rights, are not being mislead into making uninformed and unknowing decisions to take the test.

Commonwealth Dept. of Transportation, Bureau of Driver Licensing v. Fiester, 583 A. 2d 31 (Commonwealth 1990)

Commonwealth Dept. of Transportation, Bureau of Driver Licensing v. Gaul, 581 A. 2d 261 (Commonwealth 1990)

Department of Transportation v. Rapp, 589 A. 2d 805 (Pa. Commonwealth 1991)

In the case sub judice, to authorize the imposition of a penalty (in fact a two year mandatory minimum) for proscribed conduct - which is not found in the statute listing the prohibited substance- is a denial of due process.

A person cannot be convicted of a crime unless he has been given fair notice that he is engaged in proscribed activity; this is axiomatic in any intepretation of the due process clause which states in Section 1.....; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. "It is a well established principle that a criminal statute must define the crime with sufficient precision and formulate an ascertainable standard of guilt, in order that any person may be able to determine

whether any action, or failure to act, is prohibited. A criminal statute which does not comply with this principle is repugnant to the due process clause and is, therefore, invalid. This is a fundamental principle under Article XIV of our United States Constitution. In our constitutional system, it would be possible to punish a person for some action or failure to act not defined in the criminal law and which that person had no way of knowing was forbidden." National Association of Manufacturers of U.S. et al v. McGrath, 103 F.S. 510 1952. Cited with approval in United States v. Harris et al, 109 F. Supp. 641 (1953).

This court has gone so far as to require actual awareness when the conduct in question was "wholly passive." Lambert v. California, 355 U.S. 225 (1957). See

also United States v. United States Gypsum Co., 438 U.S. 422 (1978).

There is a long line of cases in Pennsylvania which affirm the proposition that a penal statute must give reasonable notice of the conduct which it prescribes to a person charged with violating its interdiction. " Commonwealth v. Heinbaugh, 467 Pa. 1354 (1976). See also, Commonwealth v. Parker White Metal Company, 512 Pa. 74 (1986).

Notice is rarely a problem with laws enacted by legislative bodies due to virtually universal requirements, both constitutional and statutory, that the public have access to such laws through prescribed filing requirements. In the instant case, however, we are confronted with an administrative ruling which serves to define which substances shall be "controlled" and through their placement

on a particular schedule, what the penalty shall be for a violation of the statute. The Controlled Substance, Drug, Device and Cosmetic Act of 1972 (35 P.S. 780-101, et seq.), hereinafter "the Act", was enacted to define criminal conduct relative to controlled substances. Included in the Act are various schedules which list proscribed substances. This is the natural and obvious place that one wishing to determine whether or not he was engaged in or planning to engage in proscribed activity would naturally look. It is important to note that the substance here in question, phenylacetone, is not found on any of the schedules contained in the statute. Therefore, anyone seeking to determine whether or not the possession of the substance is permissible would be led to believe that it was. There is no notice provided in the statute that in

order to renew the current up to date list of prosecuted substances, one must look not to the statute here in question but to the Pennsylvania Code. A reasonable person would believe that they were justified in relying on the information contained in the statute. If the legislature intended to provide other more current lists of prosecuted substances it could have and should have made explicit reference to such lists in the statute.[3]

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[3] In fact, there are new lists of proscribed substances in the Pennsylvania Drug, Device and Cosmetic Act containing items prohibited <u>after</u> the prohibition of phenylacetone. Nonetheless, Phenylacetone still has not been added to that list. 35 P.S. §780-104.

B.

DID THE AUTHORIZATION BY THE PENNSYLVANIA LEGISLATURE IN THE DRUG, DEVICE AND COSMETIC ACT PERMITTING THE SECRETARY OF HEALTH TO ADD CONTROLLED SUBSTANCES BY REGULATION CONSTITUTE AN UNCONSTITUTIONAL DELEGATION OF AUTHORITY?

Vesting the Secretary of Health with the authority to add controlled substances to the statute is an unconstitutional delegation of legislative authority. The responsibility to define criminal conduct is with our elected (not appointed) officials. Article II, Section 1 and Article III, Section 1 of Pennsylvania's Constitution designates our system of government the presumption that our elected officials define what is illegal. So, in an almost identical case to that which is before this Court, a Michigan Appellate Court 117 Mich. App 345, 323 NW2d 698 (1982) reviewed the propriety of

a defendant convicted of possession of the controlled substance, pentazocine. The case involved the provisions of the controlled substance section of the Public Health Code which permitted the State Board of Pharmacy to classify substances as "controlled".[4] The appellate court held that these provisions amounted to an unconstitutional delegation of the legislative power to create criminal offenses. Because the legislatures had

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[4] "Rule 20. "(2) Unless specifically expected or unless listed in another schedule, a material, compound, mixture, or preparation that contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomer (whether optical, position, or geometric), and the salts of such isomers, whenever the existence of such salts, isomers, and the salts of isomers is possible within the specific chemical designation, is included in schedule 3: . . ." 1979 AC, R 338.3120(2).

not defined possession of the pentazocine as a crime, the defendant's conviction for possession of that drug was reversed. People v. Turmon 117 Mich. App 345, 323 NW 2d 698, App gr (Mich) 330 NW 2d 846 (1982). Although Turmon has been reversed by the Michigan Supreme Court, Supra, we believe the standards set by the appellate court are more sound reasoning.

In order to determine whether or not there was an unconstitutional delegation of authority by the legislature of Pennsylvania to the Secretary of Health, it is essential to examine the process by which the chemical phenylacetone was included as a schedule II substance pursuant to the statute.

The records shows that on March 5th 1980, the Pennsylvania Drug, Device, and Cosmetic Board received a letter from the Department of Justice, Bureau of Drug

Control (hereinafter, "Board"), requesting that Phenylacetone be placed on schedule II of the statute (See Appendix F). In this letter Phenylacetone was referred to as "an immediate chemical precursor to metaphetamine and amphetamine in their clandestine synthesis".

At its meeting on June 30th 1980, the Board minutes reflect that "Roger Pilotti (author of the letter supra.) explained his reasons for requesting placement of phenylacetone as a controlled substance under Act 64. It would conform with Federal law, and not place extra burdens on manufacturers who have legitimate uses for the chemical" (See Appendix G).

It is important to note that at no time does Mr. Pilotti allege that phenylacetone meets the criteria established in the statute; that is, "a high potential for abuse, currently

accepted medical use in the United States, or currently accepted medical with severe restrictions, and abuse may lead to severe psychic or physical dependence". Ballots were then sent to members of the committee to vote on whether or note to include phenylacetone as a controlled substance.

There is ample authority for the proposition that the delegation of legislative authority to Administrative bodies is unconstitutional when the agency in question is given "arbitrary and uncontrolled discretion" Howell v. State, 300 So 2nd 774 (Miss. 1974). See also, State v. Gallion, 572 P 2nd 683 (Utah 1977).

The grant of such broad authority (the power to determine what substances shall be considered illegal and by their placement on a particular schedule the penalty to be imposed for violation of the

statute) must be accompanied by strict criteria which must be closely followed.

In the present case, the Board not only failed to follow the established criteria, but ignored them and acted as nothing more then a rubber stamp for the Federal Bureau of Drug Control. Because of the lack of legislative control in the statute, the Board was able to ignore the enunciated criteria and make an inappropriate recommendation to the Secretary. The Secretary then had the power to not only improperly place the substance phenylacetone on schedule II in the statute, but in doing so exercised the unrestrained power to determine the penalty for unlawful possession.

It is fruitless for the state to argue that there were adequate criteria written into the statute herein questioned when it is obvious that there were no

safeguards provided to make sure that the criteria would be followed. The statute as it was written and as it has been implemented permits extreme an unconstitutional discretion by a non-legislative body in establishing offenses and determining the punishment therefore.

IS PHENYLACETONE A CONTROLLED SUBSTANCE WITHIN THE MEANING OF THE CONTROLLED SUBSTANCE DRUG, DEVICE AND COSMETIC ACT?

The Pennsylvania Superior Court erred in citing in Commonwealth v. Tabas,[5] as authority for it's holding in the instant case. In Tabas, a case involving the drug Phentermine, the Superior Court held that:

> The Secretary of Health, pursuant to the Act, 35 P.S. 708-103, had determined that any quantity of Phentermine had a potential for psychic abuse.

In the case at bar, the Superior Court, using the Tabas standard, found that the substance in question, phenylacetone, was properly listed. It should not have so found. Phenylacetone is a precursor, it has no potential for physical or psychotic dependence. Unlike

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[5] 308 Pa. Super. 43, 454 A. 2d 12 (1982)

phentermine, * phenylacetone will not render the user "high" nor is it an immediate precursor (occurrence without delay), as required under the Regulations (see 35 P.S. § 780-103 (b)). Phentermine is a sympathomimetic drug used as an anoretic; a stimulant used for diet control. In the instant case, contrary to demonstrating abuse, testimony of the Commonwealth's expert chemist, Paul Gipe, demonstrated that phenylacetone was "merely a reactor" (NT Trial 69). Therefore, the drug, not being an immediate precursor with potential for psychic abuse, it was improperly proscribed. Further, once the evidence at trial demonstrated that the substance was "merely a reactor", it was incumbent on

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* Or for that matter, pentazocine (a depressant) proscribed by Michigan in the Turmon case, Supra.

the Commonwealth to prove potential for physical or psychotic dependence. It never did so. In fact, as stated above the Secretary and Board made its determination based upon the request of the Bureau for Drug Control without ever even considering whether or not phenylacetone met the criteria established by the legislature has found in the statute. As such the substance is legal.

3.

DID SUFFICIENT PROBABLE CAUSE EXIST TO SUPPORT THE ISSUANCE OF THE SEARCH WARRANT OBTAINED FOR AND EXECUTED ON THE DEFENDANT'S RESIDENCE?

The Pennsylvania Superior and Supreme Courts failed to follow the reasoning of recent Pennsylvania, United States Supreme Court and other case law, regarding the propriety of the search warrant. In United States v. Leon 465 U.S. 897, 104 S. CT. 3405, 82 L. Ed 2d 677 (1984), it was held that a search warrant lacked probable cause because all the appellant's activities are equally consistent with innocence as with guilt 468 U.S. at 903 R.2. Although the Leon Court went on to find a "good faith" exception to excluding a search warrant lacking in probable cause, the Pennsylvania Supreme Court, in Commonwealth v. Edmunds 373 Pa.

Super.384, 586 A.2d 887 (1991), concluded that "a good faith exception to the exclusionary rule would frustrate the guarantee embodied in Article I, Section 8, of the Pennsylvania Constitution. Accordingly, the decision of the Superior Court is reversed." Commonwealth v. Edmunds Supra.

In Edmunds the court found that the warrant failed to set forth with specificity the date upon which the anonymous informant observed the

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§8. Security from searches and seizures

The people shall be secure in their person, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

contraband (marijuana). In the case at bar, prior to the execution of the warrant, there was no indication that the contraband was ever seen at Appellant's residence. In fact, the only information the trial court used to support probable cause are as follows: "The defendant and Kenn Conley were involved in repeated purchases of various materials, chemicals and equipment used in the process of manufacturing amphetamine and methamphetamine. Both Harris and Conley had been subjects of previous investigations into such illegal manufacturing or processing. There was information that fumes, such as those created in the manufacture of methamphetamine and Phenyl-2-propanone were present at the defendant's previous address. The defendant had no visible means of support and Ken Conley was

observed at the defendant's property. The defendant was observed carrying a long hose, such as those used in the cooling of methamphetamine or phenyl-2-propanone to an out-building. The defendant was observed burning trash at 1:00 A.M."

In the case sub judice, the Superior Court reviewed the considerations for probable cause and found that,

> "although many of the items listed in the affidavit are innocuous, when considered together they support a finding that Appellant and Ken Conley manufactured methamphetamine in one of appellant's residence's outbuildings." (See Superior Court Opinion page 5).

We believe that, when viewed in light of the Edmunds standard, the information within the four corners of the warrant was either, stale or as consistent with innocence as guilt. Further, in one instance, the Superior Court considered

information which was introduced at trial to sustain the probable cause requirement. (See Appendice, Page 5).* That was improper as outside the four corners of the warrant.

Looking at the considerations, we find the following allegations and problems:

ALLEGATIONS	PROBLEM
1. 1984-1987 purchase chemicals.	Totally Legal purchase of chemicals with legitimate uses (eg. solvents).
2. Ken Conley under investigation.	He was never convicted or even indicted for any drug charge.

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* Item 11 of the Superior Court's "examination of the affidavit of probable cause supporting the warrant" ("a police chemist opened, when provided with a list of chemicals purchased by appellant and Conley, that they were engaged in the manufacture of methamphetamine and or/P-2-P.")

3.	Chemicals <u>may</u> have illegal use.	Conjecture; use <u>may</u> be as consistent with innocence as guilt.
4.	Appellant under investigation in 1974.	Very Stale.
5.	Chemicals and noxious odors noted by Appellant's landlord in 1986 and a noxious odor in the garage area.	Stale. Noxious odors are common around garages. What specific odor?
6.	Noxious odor is emitted during the manufacture of methamphetamine.	What type of noxious odor; no connection between this odor and the one in 1986.
7.	Appellant had no visible means means of support.	Was he on welfare; wealthly; did did his wife work? No information (even to date) that Appellant sold drugs.

8.	Conley visited Appellant's residence.	Conley has never been indicated for drug offenses; activity is consistent with innocence.
9.	Appellant carried a garden hose to outbuilding.	Myriad number of reasons all legitimate for carrying hose in yard/garage area.
10.	Water is a cooling agent in methamphetamine production	Also, is used legitimateley for many purposes.
11.	Chemical testimony that chemicals purchased by Appellant and Conley were used in manufacture of Methamphetamine.	Testimony was after issuance of the warrant and should not have been considered.

Moreover, nowhere in the affidavit for the search warrant was there any indication that anyone saw any controlled substance at appellant's residence. In a Washington case, State v. Matlock 27 Wash. App. 152, 616 P 2d 684 (1980), the

defendant was convicted of manufacturing a controlled substance. The affidavit in support of the search warrant said that the police officer observed some plants in the residence that appeared to be marijuana. The appeals Court reversed the conviction, finding there was no information to support the claim that the plants observed by the officer were marijuana. Again, in the case at bar, no contraband was observed (what less "appeared to be") at the place to be searched.

4.

WERE STATEMENTS ELICITED FROM THE DEFENDANT THE PRODUCT OF DURESS AND COERCION AND THUS INADMISSIBLE AT THE DEFENDANT'S TRIAL?

The Superior Court failed to follow prevailing Pennsylvania and United States Supreme Court decisions relative to coerced statements. The statements of appellant were the product of duress and coercion directed at the fate of his children. The Pennsylvania Supreme Court set the test for measuring the voluntariness of a statement as whether it is the product of an essentially free and unconstrained choice by its maker. Commonwealth v. Starkes, 461 Pa. [illegible], 335 A2d 698 (1975). As Judge Popovich related in his dissent in the Superior Court's holding in the case at bar, "Here, the police obviously knew that by pressuring

appellant's wife, she would seek to induce a confession from appellant to protect herself and her children. Such shameful conduct on the part of law enforcement officials, I will not condone. Accordingly, I would suppress appellant's statement and award him a new trial". Commonwealth v. Harris (00664HBG90) 599 A.2d 700 (1991). See also Rhode Island v. Innis (446 U.S. 301, 100 S. Ct. 1682, 64. L. Ed. 2d 297 (1990) for similar sentiments regarding police practices that police know is likely to evoke an incriminating response.

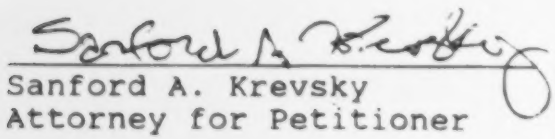
IX.

CONCLUSION

The Pennsylvania Supreme Court's decision, if upheld, will allow a standard for defining criminal conduct which is both confusing and unconstitutional as violative of both due process and improper delegation of legislative authority. Although we believe that the Tabas decision is incorrect, the Superior Court misinterpreted its standard in following its holding. The search warrant should have been found to be lacking in probable cause to search, especially under the Edmondson decision which removed the good faith exception to the exclusionary rule. Finally, the Superior Court did not follow the lead of the Pennsylvania and United

States Supreme Court in reviewing the circumstances surrounding appellant's confession.

Respectfully submitted,



Sanford A. Krevsky
Attorney for Petitioner

X.

REASONS FOR ALLOWANCE OF THE WRIT ACCORDING TO RULE 10 OF THE SUPREME COURT RULES

1. "When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals."

2. "When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court."

XI.

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APPENDIX "A"

March 13, 1992

SANFORD A. KREVSKY, ESQUIRE
1101 NORTH FRONT STREET
HARRISBURG, PA 17102
717-234-4583

RE: COMMONWEALTH OF PENNSYLVANIA
V. LLOYD HARRIS, JR.
NO. 226 M.D. ALLOCATUR 1991

Dear Petitioner:

This is to advise that the following order has been endorsed on the Petition for Allowance of Appeal in the above-captioned matter:

"03/10/92
Petition Denied.
Per Curiam"

Sincerely yours,

Patricia A. McKeever
Office of the Prothonotary
Supreme Court of Pennsylvania

c: Tamilia, Popovich & Hester, JJ
Superior 664HBG90
Kuhn, John D., J. Adams
Criminal CC-377-87
Roy A. Keefer, Esquire

APPENDIX "B"

J. A29015/91

COMMONWEALTH OF PENNSYLVANIA
V.
LLOYD BERNARD HARRIS,
Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA
NO. 00664 HARRISBURG, 1990

Appeal from the Judgement of Sentence Entered September 19, 1990, in the Court of Common Pleas of Adams County, Criminal Division, at No. CC-377-87

BEFORE: TAMILIA, POPOVICH AND HESTER, JJ.
MEMORANDUM: Filed: August 29, 1991

Lloyd Bernard Harris appeals from the judgment of sentence entered in the Court of Common Pleas of Adams County on September 19, 1990, following his conviction at a bench trial of possession with intent to deliver and criminal conspiracy. He was sentenced to a term of imprisonment of two to four years and ordered to pay various fines and fees. In this timely appeal, appellant challenges the sufficiency of the evidence supporting

his conviction and asserts that the trial court erroneously refused certain suppression motions. For the reasons which follow, we affirm.

The procedural history of this case may be summarized as follows. On the morning of July 25, 1987, several Pennsylvania State Police Officers executed a search warrant at a building situated on the same real estate where appellant's home is located. The officers discovered a quantity of phenylacetone, and appellant was arrested. After appellant made a self-incriminatory statement, he was charged with possession with intent to deliver and criminal conspiracy.

In the months following his arrest, appellant waived his right to a jury trial and filed both omnibus and supplemental omnibus pretrial motions. The trial court

conducted evidentiary hearings in connection with the various motions, which, among other things, sought the suppression of both the statement and the items seized during the search. However, it declined the requested relief. The matter then proceeded to trial.

On May 17, 1988, appellant was convicted of criminal conspiracy and possession with intent to deliver. Thereafter, following the denial of his post-verdict motions, the trial court imposed the described sentence. This appeal followed.

We first consider appellant's challenge to the propriety of the trial court's refusal of his suppression motions. In this regard, we note that our standard for reviewing such a challenge is well established.

In an appeal from an order granting

or denying a motion to suppress, the role of the appellate court is to determine whether the record supports the suppression court's factual findings and the legitimacy of the inferences and legal conclusions drawn from those findings. In making this determination, the Court may consider only the evidence of the prosecutions's witnesses and so much of the evidence for the defense as fairly read in the context of the record as a whole remains uncontradicted. When the factual findings of the suppression court are supported by the evidence, the appellate court may reverse only if there is an error in the conclusions drawn from those factual findings. Commonwealth v. Vinson, 361 Pa.Super. 526, 529, 522 A.2d 1155, 1157 (1987); Commonwealth v. Reddix, 355 Pa.Super. 514, 518, 513 A.2d 1041, 1043 (1986).

Commonwealth v. Bull, 382 Pa.Super. 559, 561, 555 A.2d 1341, 1342-43 (1989), quoting Commonwealth v. DeBooth, 379 Pa.Super. 522, 550 A.2d 570 (1988). Keeping these principles in mind, we must examine the evidence and, thereafter, consider appellant's specific claims. Since our review of the briefs reveals that neither party assails the correctness

of the facts found by the trial court or those set forth in the affidavit of probable cause prepared by Pennsylvania State Trooper Mervin Hill, we will utilize them in our analysis.

On July 25, 1987, Officer Hill, utilizing both a list of chemicals purchased by appellant and the opinion of Paul Gipe, a police chemist, that such chemicals could be used to manufacture methamphetamine, obtained a search warrant. While executing that warrant, Hill discovered a quantity of phenylacetone, a substance with which he had a wealth of experience. Following that discovery, the officers present informed appellant's wife that if she were arrested and unable to post bail, something would have to be done about her children. Mrs. Harris responded by pleading with appellant, who previously

had been informed of his Miranda rights, to cooperate. Appellant then made a statement.

Appellant asserts that the warrant utilized by the officers was not issued upon the requisite probable cause. In support of this assertion, which we find is without merit, he contends that the information set fort in the affidavit of probable cause eith demonstrated legal activity or was stale.

In Commonwealth v. Weidenmoyer, supra, 518 Pa. 2, 539 A.2d 1291 1291 (1988), our Supreme Court discussed the test utilized for determining the propriety of the issuance of a search warrant. Quoting language set forth in Commonwealth v. Gray, 509 Pa. 476, 503 A.2d 921 (1985), the Court stated:

> The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given

> all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing] that probable cause existed." Jones v. United States, [362 U.S. 257, 271, 80 S.Ct. 725, 736, 4 L.Ed.2d 697 (1960)].

Commonwealth v. Weidenmoyer, supra, 518 Pa. at 8, 539 A.2d at 1294. In addition, the court indicated that the appropriateness of the grant of a warrant must be judged on the basis of the information before the district justice at the time of its issuance and that his decision is entitled to great deference. Id. Utilizing these principles, we consider both aspects of appellant's claim.

An examination of the affidavit of probable cause supporting the warrant

reveals that: 1) on eleven occasions between May 5, 1984, and July 24, 1987, appellant purchased chemicals and related materials from the Bowman Mel Chemical Company; 2) Kenn Conley, who had been under investigation in connection with the manufacture of methamphetamine and phenyl-2-propanene, made twenty-four purchases of chemicals from Bowman-Mel; 3) a number of the chemicals purchased by the two men may be used in the process of manufacturing methamphetamine and/or P-2-P; 4) appellant was under investigation in 1979 for being a member of a methamphetamine distribution/manufacturing ring; 5) in early 1986, appellant's landlord visited the premises and discovered, along with various empty chemical containers, a noxious odor in an outbuilding; 6) in the methamphetamine and/or P-2-P manufacturing process a noxious and lingering odor is

emitted; 7) appellant has no visible means of support; 8) Kenn Conley previously visited appellant's residence; 9) at 1:00 a.m. on July 25, 1987, an officer observed appellant carry a hose into the outbuilding; 10) water is often used as a cooling agent in the methamphetamine manufacturing process; and 11) a police chemist opined, when provided with a list of chemicals purchased by appellant and Conley, that they were engaged in the manufacture of methamphetamine and/or P-2-P.

As our review of the affidavit indicates, many of the items mentioned, by themselves, are innocuous. However, when considered together, they support a finding that appellant and Kenn Conley manufactured methamphetamine in one of appellant's residence's outbuildings. Since methamphetamine is a controlled

substance, 35 P.S. § 780-104(2) (iii) (4), and its manufacture by an unregistered person, such as appellant, is a crime, 35 P.S. §780-113 (a) (30), such a finding leads to the conclusion that appellant committed a crime, and evidence of it could be unearthed in the outbuilding. Therefore, as the district justice properly issued the warrant, appellant's suppression claim must fail.

Although a majority of the items set forth in the affidavit relate to temporarily remote events, this fact alone does not compel a different result. Even if we assumed that the 1979 investigation of appellant, which has little effect upon the determination of probable cause, were stale, it is clear that the remaining items are not. By those items, one could conclude that appellant had been engaged in his illegal manufacturing activities

from 1984 to the date that the warrant was issued. Thus, they properly could support a find of probable cause. See Commonwealth v. Weidenmoyer, supra.

Appellant also asserts that the statement made by him was coerced and subject to suppression. This claim is without merit. It long has been clear that the fifth amendment is not applicable to the conduct of private individuals unless they act as instrumentalities of the government. See Commonwealth v. Ognibene, 364 Pa.Super. 165, 527 A.2d 579 (1987). Consequently, since the statement challenged by appellant was elicited by his wife, a private individual, our determinations as to the propriety of the trial court's decision initially hinges upon whether Mrs. Harris was acting on the state's behalf when she pleaded with him to cooperate. In resolving this issues,

we must decided whether the government either acquiesced in or ratified Mrs. Harris's conduct. See Commonwealth v. Ognibene, supra.

Although the facts indicate that Mrs. Harris began making her pleas after officers informed her that something would have to be done about her children if she were arrested and unable to post bail, this information correctly apprised her of the situation with her husband to cooperate. Furthermore, we note that the record contains no additional evidence relating to the issues of acquiescence and ratification.[1] Therefore, we find that Mrs. Harris was acting as a private individual when she elicited the contested

---

[1] Although appellant's statement was utilized by the prosecution at trial, this action did not serve to ratify Mrs. Harris's conduct. See Commonwealth v. Ognibene, supra.

statement and conclude that the trial court properly refused appellant's suppression claim.

Appellant asserts that since the evidence presented at trial merely indicated that phenylacetone was a precursor or reactor chemical, the Commonwealth failed to demonstrate that it both had a high potential for abuse and could cause either psychic or physical dependance.[2] Accordingly, he contends that the evidence presented at trial was insufficient to support his conviction for possession with intent to deliver.

Preliminarily, we note:

> The test for determining the sufficiency of the evidence is whether, viewing the evidence in the light most

---

[2] In conjunction with this claim, appellant alleges that phenylacetone is not a controlled substance. However, as we discussed this question in the body of our memorandum, we need not consider it further here.

favorable to the Commonwealth as verdict winner and drawing all proper inferences favorable to the Commonwealth , the [fact-finder] could reasonably have determined all elements of the crime to have been established beyond a reasonable doubt. Commonwealth v. Syre, 507 Pa. 299, 489 A.2d 1340 (1985). This standard is equally applicable to cases where the evidence is circumstantial rather than direct so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt. Commonwealth v. Sullivan, 472 Pa. 129, 150, 371 A.2d 468, 478 (1977); Commonwealth v. Farquharson, 467 Pa. 50, 354 A.2d 545 (1976); Commonwealth v. Cox, 466 Pa. 582, 353 A.2d 844 (1976).

Commonwealth v. Hardcastle, 519 Pa. 236, 246, 546 A.2d 1101, 1105 (1988); see also Commonwealth v. Scott, 376 Pa.Super. 416, 546 A.2d 96 (1988). In the present case, neither party challenges the propriety of the conclusion that appellant manufactured phenylacetone with the intent to deliver it. In addition, it is uncontested that the Commonwealth presented no evidence relating to that chemical's potential for abuse or its ability to cause psychic or

physical dependence. Thus, resolution of appellant's claim depends upon whether the Commonwealth was required to prove those matters as part of its case.

According to 35 P.S. 780-113 (a) (30), it is unlawful for a an unregistered person to possess a controlled substance with the intent to deliver it. The Secretary of Health, pursuant to authority granted to him by 35 P.S. § 780-103, has determined that phenylacetone both has a high potential for abuse and causes psychic or physical dependence and added it to the lists of controlled substances set forth in 35 P.S. §780-104. See 28 Pa.Code § 25.72 (c) (3) (v). In light of the secretary's determinations, we find that the Commonwealth was not required to demonstrate these matters at trial. See Commonwealth v. Tabas, 308 Pa.Super. 43, 454 A.2d 12 (1982) (Commonwealth was not

required to demonstrate that the quantity of phentermine possessed by the defendant had a potential for abuse since the Secretary of Health previously made the determinations that any quantity of that substance had a potential for abuse when adding it to the lists of controlled substances). Accordingly, appellant's challenge to the sufficiency of the evidence must fail.

Judgment of sentence affirmed.

POPOVICH, J., files a Dissenting Memorandum.

Dated: August 29, 1991

Judgment Entered

Deputy Prothonotary

J. A29015/91

COMMONWEALTH OF PENNSYLVANIA,
Appellee
V.
LLOYD BERNARD HARRIS,
Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA
NO. 664 HARRISBURG, 1990

Appeal from the Judgment of Sentence of the Court of Common Pleas of Adams County, Criminal Division, at No. CC-377-87

BEFORE: TAMILIA, POPOVICH AND HESTER, JJ.
DISSENTING MEMORANDUM BY POPOVICH, J.:
Filed: August 29, 1991

I respectfully but vigorously dissent from that portion of the opinion of the majority which determined appellant's wife "was acting as a private individual when she elicited the contested statement" and concluded "the trial court properly refused appellant's suppression claim." I find the actions of the police in the present case to be most reprehensible. I also conclude that the police's threat of arrest not only coerced appellant's wife

into acting on behalf of the Commonwealth but also was intended to reach that result.

In Rhode Island v. Innis, 446 U.S. 301, 302, 100 S.Ct. 1682, 1690, 64 L.Ed. 297, _____ (1980), the Untied States Supreme Court stated:

> ... the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. (footnote omitted)

Instantly, the police, by threat of incarceration and removal of her children from her custody, coerced appellant's wife into inducing appellant to give a statement to the police after he was arrested and give his Miranda warnings. I cannot think of a clearer situation where a private citizen is acting as an instrument of the government. See,

Commonwealth v. Ognibene, 364 Pa.Super. 165, 527 A.2d 579 (1989). Here, the police obviously knew that by pressuring appellant's wife, she would seek to induce a confession from appellant to protect herself and her children. Such shameful conduct on the part of law enforcement officials, I will not condone. Accordingly, I would suppress appellant's statement and award him a new trial.

APPENDIX "C"

IN THE COURT OF COMMON PLEAS OF ADAMS COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff

V. CC-377-87

LLOYD BERNARD HARRIS,
Defendant

ORDER OF COURT

AND NOW, this 6th day of April, 1990, Defendant's Post-Verdict Motions are hereby denied. Defendant is directed to appear for sentencing in Courtroom No. 2 on the 30th day of May, 1990, at 9:00 a.m.

The Probation Office is directed to perform a pre-sentence investigation and submit a copy to the Court before the date set for sentencing.

BY THE COURT,

JOHN D. KUHN
JUDGE

IN THE COURT OF COMMON PLEAS OF ADAMS COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff

v. CC-377-87

LLOYD BERNARD HARRIS,
Defendant

OPINION ON DEFENDANT'S

POST-VERDICT MOTIONS

On July 25, 1987, Defendant was charged with Possession With Intent to Manufacture a Controlled Substance, phenylacetone, in violation of the Controlled Substance, Drug, Device & Cosmetic Act of 1972, 35 P.S. 780-101, et seq., hereinafter "the Act", and Criminal Conspiracy, 18 Pa.C.S.A. §903, as the result of a search incident to a search warrant issued by Magistrate Thomas R. Carr. Pre-trial motions were denied on

March 28, 1988 and May 17, 1988. After a non-jury trial on May 17, 1988, the undersigned found Defendant guilty of both charges.

Defendant filed timely post-verdict motions raising the following issues:

1. Whether phenylacetone is a controlled substance under the Act;

2. Whether sufficient probable cause existed for issuance of the search warrant;

3. Whether Defendant's confession was the product of improper coercion.

Initially, Defendant contends that phenylacetone is not a prohibited controlled substance under the Act. We agree that phenylacetone is not listed as a controlled substance in any of the schedules of the Act, 35 P.S. §870-104. However, the Secretary of Health may by regulation add a substance to any

schedule. The Secretary must first request advice in writing from the Pennsylvania Drug, Device and Cosmetic Board whether the substance should be controlled and shall consider the following factors:

1. Its actual or relative potential for abuse;

2. Scientific evidence of its pharmacological effect, if known;

3. State of current scientific knowledge regarding the substance;

4. Its history and current pattern of abuse;

5. The scope, duration, and significance of abuse;

6. The risk there is to the public health;

7. Its psychic or physiological dependence liability;

8. Whether the substance is controlled under Federal law; and

9. Whether the substance is an immediate precursor of a substance already controlled under this Section. After considering the above factors, the secretary shall make findings with respect

thereto and shall issue a regulation controlling the substance if he finds that the substance has a potential for abuse. 35 P.S. §780-103(a). Furthermore, if a substance is designated an immediate precursor, then a substance which is a precursor of a controlled precursor is not subject to control solely because it is a precursor of the controlled precursor. 35 P.S. §780-103(b).[1]

The Secretary of Health has by regulation added substances to the schedules including adding phenylacetone to Schedule II controlled substances. See 28 Pa.Code §25.72(C)(3)(v) which provides,

...

---

[1] "Immediate precursor" is defined as a substance which the secretary has found to be and by regulation designates as being a principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance. 35 P.S. §780-102.

(C) Schedule II. In determining that a substance comes within this schedule, the Secretary will find: a high potential for abuse; currently accepted medical use in the United States; or currently accepted medical use with severe restrictions and abuse may lead to severe psychic or physical dependence. The following controlled substances are included in this schedule:

...

(3) Unless specifically excepted or unless listed in another schedule, a material, compound, mixture or preparation which contains any quantity of the following substances:

...

(v) Phenylacetone.

Defendant argues that once the trial evidence offered by Pennsylvania State Police Chemist, Paul Gipe, demonstrated that phenylacetone is a precursor or reactor, the Commonwealth has the burden of establishing that the substance meets all the criteria for a Schedule II substance. 35 P.S. §780-104(2) and 28 Pa.Code §25.72(C)(3). This issue has been resolved by Commonwealth v. Tabas, 308 Pa.Super. 43, 454 A.2d 12 (1982). There

defendant argued that the Commonwealth failed to demonstrate that phentermine, a substance added by the Secretary to Schedule IV, 28 Pa.Code §25.72(e)(3)(ii), in the amount possessed had a potential for abuse. The Superior Court held that,

> The Secretary of Health, pursuant to the Act, 35 P.S. 708-103, had determined that any quantity of phentermine had a potential for abuse. Therefore, the Commonwealth was not required to demonstrate the drug's potential for abuse. 308 Pa.Super. at 51, 454 A.2d at 16.

We find Tabas to be dispositive of this issues. It becomes the Defendant's burden at this point to demonstrate that the Secretary failed to follow the aforementioned procedure. He has not done so, therefore, we find that phenylacetone is a controlled substance.

Next, Defendant contends that the search warrant was not based upon sufficient probable cause. The three page

affidavit of probable cause for the search warrant indicated the following: 1) that on 11 occasions between May 5, 1984 and July 27, 1987 Defendant purchased various chemicals including acetone at Bowman Mel Chemical Company in Harrisburg, Pennsylvania, 2) that on 24 occasions between May 28, 1985 and July 9, 1987 Ken Conley purchased various chemicals at the same location, 3) that on July 24, 1987 Defendant purchased one gallon of acetone, 4) that Conley has been the subject of an investigation by Trooper Mervin E. Hill, Jr., Region III Strike Force, involving the manufacture of controlled substance, methamphetamine and phenyl-2-propanone, 5) that numerous chemicals purchased by Defendant and Conley are solvents, reagents or precursors in the manufacture of the aforesaid controlled substances, 6) that Trooper Hill has 15 years of

experience in drug investigations, 7) that in 1986 Defendant's landlord smelled a noxious odor in a barn containing empty chemical containers on property leased by Defendant and that when the aforesaid controlled sub tances are manufactured a noxious odor is emitted, 8) that Defendant has no visible means of support, 9) that on July 25, 1987, Defendant was seen carrying a garden hose into an outbuilding at his residence and that clandestine labs often use water to cool chemicals in the manufacturing phase of the aforesaid controlled substance, 10) that a person fitting Conley's description was seen at Defendant's residence, and 11) that Pennsylvania State Police Chemist, Paul Gipe, opined that based upon the list of chemicals purchased recently by Defendant and Conley, they were involved in manufacturing methamphetamine and/or

phenyl-2-propanone.

Specifically, Defendant contends that the information contained in the affidavits was stale or based upon otherwise legal activity.

Our Supreme Court, in Commonwealth v. Gray, 509 Pa. 476, 503 A.2d 921 (1985), adopted the totality of the circumstances standard for analyzing probable cause for issuance of a search warrant. That standard is stated as follows:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for...conclud[ing] that probable cause existed." Commonwealth v. Gray, 509 Pa. at 484, 503 A.2d at 925.

In addition, the probable cause determination of the issuing authority

must be accorded great deference. Commonwealth v. Carelli, 308 Pa.Super. 522, 530, 454 A.2d 1020 (1982).

While probable cause cannot, as a general rule, be founded upon stale or remote information, corroborative information which is not current can be considered by the magistrate so long as it relates to prior conduct which is sufficiently similar to the acts in question. Furthermore, evidence of prior criminal activity may support a finding of probable cause if the criminal activity continued up to or about the time the warrant was issued. Commonwealth v. Weidenmoyer, 518 Pa.2, 10, 539 A.2d 1291, 1295 (1988). Factors to consider in determining whether information has grown stale include 1) the quality and nature of the seized evidence, 2) the ease with which the evidence may be disposed of, 3)

the lapse of time between the information and the warrant, 4) the character of the crime, 5) whether the defendant is nomadic or entrenched, 6) whether the thing to be seized is perishable, easily transferable or of enduring utility to its holder, and 7) whether the place to be searched is a forum of convenience for the criminal or a secure operational base. Commonwealth v. Alewine, _____ Pa.Super. _____, _____, 558 A.2d 542, 543 (1989).

Reviewing these factors we conclude that probable cause existed for issuance of the search warrant. Although certain information, standing alone, was stale and much of the activity could be separately viewed as legal, the totality of the circumstances demonstrates a fair probability that contraband would be found on the premises.

The otherwise dated or stale

information and Conley's history corroborates Trooper Gipe's opinion that a clandestine drug manufacturing operation was in progress. A clear nexus existed between the prior activities of chemical purchases, the officer's experience, the chemist's opinion, the purchase of acetone on July 24, 1987, and the carrying of the garden hose on July 25, 1987, to suggest that the controlled substances were being produced at that time.

The search resulted in the seizure of a quantity of phenylacetone together with written formulas, chemicals, laboratory equipment and paraphernalia consistent with the manufacturing of phenylacetone. Because this was an ongoing operation rather than a street sale of drugs, evidence which would otherwise be stale is more relevant. Furthermore, actions taken by Defendant within 24 hours of the search

appeared to be steps in the manufacturing process.

We have no difficulty in concluding that there was sufficient probable cause for issuance of a search warrant.

Finally, Defendant argues that the confession he gave on the date of his arrest was the product of psychological coercion and therefore inadmissible. At the Suppression Hearing held on March 28, 1988, President Judge Oscar F. Spicer entered the following findings of fact on this issue:

5. A discussion occurred between the officers and Mrs. Harris, concerning what would happen if she were arrested.

6. The officers indicated to Mrs. Harris that if she were arrested and could not post bail, something would have to be done about the children.

7. Whether Mrs. Harris understood this or not, she did plead with her husband to cooperate.

8. The Defendant has not testified that his admissions were motivated

entirely by the pleas of his wife.

9. The officers themselves made no improper statements that would have invalidated the voluntariness of the confession.

10. The Defendant was informed of, and understood, his Miranda Rights.

The Commonwealth has the burden of proving by a preponderance of the evidence, whether based upon the totality of the circumstances, the statements given by the Defendant were voluntary and the waiver of his constitutional rights was knowing and intelligent. Commonwealth v. Edwards, _____ Pa. _____, _____, 555 A.2d 818, 826 (1989). A statement is not voluntary if the suspect's will is overborne and his capacity for self-determination is critically impaired by physical or psychological coercion. Commonwealth v. Schroth, 495 Pa. 561, 567, 435 A.2d 148, 151 (1981).

Here, there is no evidence that the

police coerced Defendant's statements. His wife may have pressured him to confess out of concern for the children, however, the 5th Amendment proscribes only action by governmental agents, not by private individuals who are not acting as instrumentalities of the government. Commonwealth v. Ognibene, 364 Pa.Super. 165, 167, 527 A.2d 579, 580 (1987).

Therefore, we enter the attached Order.

BY THE COURT,

JOHN D. KUHN

JUDGE

APPENDIX "D"

IN THE COURT OF COMMON PLEAS OF
ADAMS COUNTY, PA
CRIMINAL

COMMONWEALTH

vs.

LLOYD BERNARD HARRIS CC-377-87

ORDER OF COURT

AND NOW, this 28th day of March, 1988, based upon the evidence, the Court refused the Motion to Quash.

The Court enters the following Findings of Fact:

1. The incident of arrest occurred July 25, 1987, at the time a Search Warrant was issued.

2. The officer executing the Search Warrant had information provided by a State Police Chemist, Paul Gipe,

concerning lists of chemicals purchased by the Defendant, and had the benefit of the opinion of Mr. Gipe that the Defendant might have been manufacturing phenalacetone.

3. Officer Hill is a person with a wealth of experience in phenalacetone.

4. When executing the Warrant, the officer noticed the substance which he identified as phenalacetone.

5. A discussion occurred between the officers and Mrs. Harris, concerning what would happen if she were arrested.

6. The officers indicated to Mrs. Harris that if she were arrested and could not post bail, something would have to be done about the children.

7. Whether Mrs. Harris understood this or not, she did plead with her husband to cooperate.

8. The Defendant has not testified

that his admissions were motivated entirely by the pleas of his wife.

9. The officers themselves made no improper statements that would have invalidated the voluntariness of the confession.

10. The Defendant was informed of, and understood, his Miranda Rights.

CONCLUSIONS OF LAW:

1. The confession by the Defendant was voluntary.

2. The confession of the Defendant was given in full awareness and waiver of his constitutional rights.

The following rulings are entered:

1. The request for the Motion to Quash is denied.

2. The Motion for Suppression is denied.

3. There is reserved for trial the issues of probable cause, as contained in

the Application for Search Warrant, and the staleness of the Warrant. Both of these issues will be decided immediately prior to trial.

BY THE COURT:

OSCAR F. SPICER,

President Judge

jcb

Roy A. Keefer, Esquire

Sanford Krevsky, Esquire

APPENDIX "E"

35 Pa Misc 104 (35 PS 780-104)
Schedules of controlled substances

The following schedules include the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated.

(1) Schedule I-In determining that a substance comes within this schedule, the secretary shall find: a high potential for abuse, no currently accepted medical use in the United States, and a lack of accepted safety for use under medical supervision. The following controlled substances are included in this schedule: (i) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of such isomers,

esters, ethers and salts is possible within the specific chemical designation:

1. Acetylmethadol.
2. Allylprodine.
3. Alphacetylmethadol.
4. Alphameprodine.
5. Alphamethadol.
6. Benzethidine.
7. Betacetylmethadol.
8. Betameprodine.
9. Betamethadol.
10. Betaprodine.
11. Clonitazene.
12. Dextromoramide.
13. Dextrorphan (except its methylether)
14. Diampromide.
15. Diethylthiambutene.
16. Dimenoxadol.
17. Dimepheptanol.
18. Dimethylthiambutene.
19. Dioxaphetyl butyrate.

20. Dipipanone.

21. Ethylmethylthiambutene.

22. Etonitazene.

23. Etoxeridine.

24. Furethidine.

25. Hydroxypethidine.

26. Ketobemidone.

27. Levomoramide.

28. Levophenacylmorphan.

29. Morpheridine.

30. Noracymethadol.

31. Norlevorphanol.

32. Normethadone.

33. Norpipanone.

34. Phenadoxone.

35. Phenampromide.

36. Phenomorphan.

37. Phenoperidine.

38. Piritramide.

39. Proheptazine.

40. Properidine.

41. Racemoramide.

42. Trimeperidine.

(ii) Any of the following opium derivatives, their salts, isomers and salts of isomers, unless specifically excepted, whenever the existence of such salts, isomers and salts of isomers is possible within the specific chemical designation:

1. Acetorphine.

2. Acetyldihydrocodeine.

3. Benzylmorphine.

4. Codeine methylbromide.

5. Codeine-N-Oxide.

6. Cyprenorphine.

7. Desomorphine.

8. Dithydromorphine.

9. Etorphine.

10. Heroin.

11. Hydromorphinol.

12. Methyldesorphine.

13. Methylhydromorphine.

14. Morphine methylbromide.

15. Morphine methylsulfonate.

16. Morphine-N-Oxide.

17. Myrophine.

18. Nicocodeine.

19. Nicomorphine.

20. Normorphine.

21. Pholcodine.

22. Thebacon.

(iii) Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, their salts, isomers, and salts of isomers, unless specifically excepted, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. 3,4-methylenedioxy amphetamine.

2. 5-methoxy-3,4-methylenedioxy amphetamine.

3. 3,4,5-trimethoxy amphetamine.

4. Bufotenine.

5. Diethyltryptamine.

6. Dimethyltryptamine.

7. 4-methyl-2,5-dimethoxyamphetamine.

8. Ibogaine.

9. Lysergic acid diethylamide.

10. Mescaline.

11. Peyote.

12. N-ethyl-3-piperidyl benzilate.

13. N-methyl-3-piperidyl benzilate.

14. Psilocybin.

15. Psilocyn.

16. Tetrahydrocannabinols.

(iv) Marihuana.

(v) Any material, compound, mixture, or preparation which contains any quantity of the following substances, including the salts, isomers and salts of isomer:

1. Methaqualone.

(2) Schedule II- In determining that a

substance comes within this schedule, the secretary shall find: a high potential for abuse, currently accepted medical use in the United States, or currently accepted medical use with severe restrictions, and abuse may lead to sever psychic or physical dependence. The following controlled substances are included in this schedule:

(i) Any of the following substances, of any quantity, except those narcotics specifically excepted or listed in other schedules, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by combination of extraction and chemical synthesis:

1. Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

2. Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in subclause 1, except that these substances shall not include the isoquinoline alkaloids of opium.

3. Opium poppy and poppy straw.

4. Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but shall not include decocainized coca leaves or extracts of coca leaves, which extracts do not contain cocaine or ecgonine.

(ii) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters and ethers, of any quantity, unless

specifically excepted or listed in another schedule, whenever the existence of such isomers, esters, ethers and salts is possible within the specific chemical designation:

1. Alphaprodine.
2. Anileridine.
3. Bezitramide.
4. Dihydrocodeine.
5. Diphenoxylate.
6. Fentanyl.
7. Isomethadone.
8. Levomethorphan.
9. Levorphanol.
10. Metazocine.
11. Methadone.
12. Methadone-Intermediate, 4-cyano-2-dimethy-lamino-4,4-diphenyl butane.
13. Moramide-Intermediate, 2-methyl-3-morpholino-1,1-diphenyl-propane-carboxylic acid.

14. Pethidine.

15. Pethidine-Intermediate-A,4-cyano-1-methyl-4-phenylpiperidine.

16. Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate.

17. Pethidine-Intermediate-C, 1-methyl-4-phenylpiper-idine-4-carboxylic acid.

18. Phenazocine.

19. Piminodine.

20. Racemethorphan.

21. Racemorphan.

(iii) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances:

1. Amphetamine, its salts, optical isomers, and salts of its optical isomers.

2. Phenmetrazine and its salts.

3. Methylphenidate.

4. Methamphetamine including its salts,

isomers and salts of isomers.

(iv) The phrase "opiates" as used in section 4 of this act and elsewhere throughout the act shall not include the dex-trorotatory isomer of 3-methoxy-n-methylmorphinan and its salts, but does not include its racemic and levorotatory forms.

(v) Any material, compound, mixture, or preparation unless specifically excepted which contains any quantity of:

1. Phencyclidine.

(3) Schedule III- in determining that a substance comes within this schedule, the secretary shall find: a potential for abuse less than the substances listed in Schedules I and II; well documented and currently accepted medical use in the United States; and abuse may lead to moderate or low physical dependence or high psychological dependence. The

following classes of controlled substances are included in this schedule:

(i) Any material, compound, mixture, or preparation unless specifically excepted or unless listed in another schedule which contains any quantity of the following substances:

1. Any substance which contains any quantity of a derivative of barbituric acid, or and salt of a derivative of barbituric acid.

2. Chorhexadol.

3. Glutethimide.

4. Lysergic acid.

5. Lysergic acid amide.

6. Methyprylon.

7. [Deleted]

8. Sulfondiethylmethane.

9. Sulfonethylmethane.

10. Sulfonmethane.

(ii) Nalorphine.

(iii) Any material, compound, mixture, or preparation containing limited quantities of the following narcotic drugs, or any salts thereof, unless specifically excepted or listed in other schedules:

1. Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium.

2. Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

3. Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium.

4. Not more than 300 milligrams of

dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

5. Not more than 1.8 grams of dihyrdocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

6. Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

7. Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic

ingredients in recognized therapeutic amounts.

8. Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams and not more than 2.5 milligrams per dosage unit with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(iv) [Not in original.]

(v) The secretary may by regulation except any compound, mixture, or preparation containing any drug or controlled substance listed in subclauses (i) and (ii) of this schedule above from the application of those provisions of this act covering controlled substances, if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a stimulant or depressant effect on the central nervous system: Provided, That such admixtures

shall be included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse of the substances which do have a stimulant or depressant effect on the central nervous system.

(vi) The secretary shall by regulation exempt any nonnarcotic substance from the control under this act if such substance may, under the provisions of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.), be lawfully sold over the counter without a prescription.

(vii) Anabolic steroid includes any material, compound, mixture or preparation that includes any of the following or any isomer, ester, salt or derivative of any of the following that acts in the same manner on the human body:

1. Chorionic gonadotropin.

2. Clostebol.

3. Dehydrochlormethyltestosterone.

4. Ethylestrenol.

5. Fluoxymesterone.

6. Mesterolone.

7. Metenolone.

8. Methandienone.

9. Methandrostenolone.

10. Methyltestosterone.

11. Nandrolone decanoate.

12. Nandrolone phenpropionate.

13. Norethandrolone.

14. Oxandrolone.

15. Oxymesterone.

16. Oxymetholone.

17. Stanozolol.

18. Testosterone propionate.

19. Testosterone-like related compounds.

Human Growth Hormone (HGH) shall not be included as an anabolic steroid under the provisions of this act.

(4) Schedule IV- In determining that a

substance comes within this schedule, the secretary shall find: a low potential for abuse relative to substances in Schedule III; currently accepted medical use in the United States; and limited physical and/or psychological dependence liability relative to the substances listed in Schedule III. The following controlled substances are included in this schedule:

(i) Any material, compound, mixture, or preparation, unless specifically excepted or unless listed in another schedule, which contains any quantity of the following substances:

1. Barbital.
2. Chloral betaine.
3. Chloral hydrate.
4. Ethchlorvynol.
5. Ethinamate.
6. Methohexital.
7. Meprobamate.

8. Methylphenobarbital.

9. Paraldehyde.

10. Petrichloral.

11. Phenobarbital.

(ii) The secretary may by regulation except any compound, mixture, or preparation containing any drug or controlled dangerous substance listed in subclause (i) of this schedule above from the application of those provisions of this act covering controlled drugs, if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a stimulant or depressant effect on the central nervous system: Provided, That such admixtures shall be included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse of the substances which do have a stimulant or depressant effect on the central nervous

system.

(iii) The secretary shall by regulation exempt any nonnarcotic substance from the control under this act if such substance may, under the provisions of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.), be lawfully sold over the counter without prescription.

(5) Schedule V- In determining that a substance comes within this schedule, the secretary shall find: a low potential for abuse relative to the substances listed in Schedule IV; currently accepted medical use in the United States; and limited physical dependence and/or psychological dependence liability relative to the substances listed in Schedule IV. The following controlled substances are included in this schedule:

(i) Any compound, mixture or

preparation containing limited quantities of any of the following narcotics or any of their salts, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation, valuable medicinal qualities other than those possessed by the narcotic alone:

1. Not more than 200 milligrams of codeine, or any of its salts, per 100 milliliter [sic]or per 100 grams and not more than 10 milligrams per dosage unit.

2. Not more than 100 milligrams of dihydrocodeine, or any of its salts per 100 milliliters or per 100 grams and not more than 5 milligrams per dosage unit.

3. Not more than 100 milligrams of ethylmorphine, or any of its salts, per 100 milliliters or per 100 grams and not more than 5 milligrams per dosage unit.

4. Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.

5. Not more than 100 milligrams of opium per 100 milliliters or per 100 grams, or not more than 5 milligrams per dosage unit.

(ii) Buprenorphine.

HISTORY: 12-22-89, Act 104 §1 (PL 750), eff. 2-20-90 12-22-89, Act 91, §1 (PL 700); 7-3-85, Act 39, §1 (PL 138); 11-26-78, Act 328, §1 (PL 1392); 4-14-72, Act 64, §4 (PL 233)

APPENDIX "F"

(717) 787-2307

March 7, 1980

Mr. Roger L. Pilotti
Compliance/Diversion Coordinator
Bureau of Drug Control
Department of Justice
Bldg. 208 Hbg. Int'l. Airport
Middletown, PA 17057

Dear Mr. Pilotti:

Thank you for your letter of March 3, 1980 requesting the inclusion of Phenylacetone into Schedule II of State law.

We will ad this material to that supplied by the Drug Enforcement Administration for presentation to the Drug, Device and Cosmetic Board for consideration at their next meeting scheduled for June 16, 1980. Your presentation of this information would be most helpful. The data will assist the members of the Board in making their

recommendation to the Secretary of Health.

Sincerely,

Jack B. Ogun, R.Ph.
Director
Division or Drugs,
Devices and Cosmetics

JBO:gi

March 3, 1980

Mr. Jack B. Ogun
Secretary
Pennsylvania Drug, Device
and Cosmetic Board
P.O. Box 90
Harrisburg, Pennsylvania 17120

RE: Request for placement of Phenylacetone into Schedule II under Act 64

Dear Mr. Ogun:

This is to inform you that effective February 11, 1980, Phenylacetone (Phenyl-2-Propanone, P2P, benzyl methyl ketone, methyl benzyl ketone) became a Schedule II Controlled Substance under the Federal Controlled Substance Act. This action results from the increasing evidence of use of Phenylacetone as an immediate chemical precursor to Methamphetamine and Amphetamine in their immediate chemical precursor to Methamphetamine and Amphetamine in the clandestine synthesis.

The effect of the Order which appeared in Volume 44, Number 240, Wednesday, December 12, 1979 in the Federal Register provides regulatory controls upon the manufacture, distribution, dispensing, importation and exportation of this immediate precursor to Methamphetamine and Amphetamine.

There were three (3) cases in 1978 concerning clandestine laboratories using Phenylacetone in the manufacture of Methamphetamine which were investigated by Drug Law Enforcement within the Pennsylvania Department of Justice and there were five (5) cases concerning clandestine laboratories manufacturing Methamphetamine in 1979. There were various other cases where the sale of Phenylacetone was negotiated on the streets of Pennsylvania for the sole purpose of manufacturing clandestine

Amphetamines and Methamphetamine.

With the placement of Phenylacetone as a controlled substance in Schedule II federally no additional burdens will be placed on the manufactures, distributors, dispensers, importers or exporters within the Commonwealth of Pennsylvania. As you are aware, it is mandatory that these registrants follow federal law when there is no existing Pennsylvania law.

Therefore, my urgent request for the placement of Phenylacetone into Schedule II within Pennsylvania under Act 64 will enable not only agents and troopers working under Drug Law Enforcement, but all law enforcement officers in Pennsylvania to be able to arrest and prosecute under Pennsylvania law rather than rely on the federal regulations which

must be prosecuted in federal court at the discretion of the United States Attorney.

Please do not hesitate to contact me if you have any additional questions concerning this request. Also, if it is necessary I will be most happy to testify before the Drug, Device and Cosmetic Board concerning this matter.

Sincerely,

Roger L. Pilotti
Compliance/Diversion
Coordinator

RLP/laj
Attachment (1)
cc: Mr. Weatherbee
Mr. Scala
Petition File
Compliance File
Chronological File

Only as much as the basic requested data as possible, giving specific figures. Do not identify those abusing the substance. Should you all of the information, an abbreviated petition is still welcomed and given full consideration.

NAME Roger L. Pilotti
TITLE: Compliance/Diversion Coordinator
ADDRESS Bldg # 208, Hbg Int'l Airport, Middletown, PA 17057.
HOME PHONE 717-545-1706
BUSINESS PHONE 717-783-1672
GROUP REPRESENTED PA Department of Justice, Bureau of Drug Control

1. Substance or product proposed for scheduling Phenylacetone

2. Manufactured by Various

3. Other identification P2P (Phenyl-2-Propanone)

4. Legal source of supply, if know Chemical Supply Firms

5. Is there obvious abuse in your community? Yes Explain* The abuse of Amphetamine and Methamphetamine are of long standing in Pennsylvania

6. Can you provide statistics on the problem? Yes

7. Have you or your group been personally involved? Yes Explain* In enforcing Act 64

8. What effect would control of this substance have on users and others in the community?* This would allow for arrests

for illegal sales under Pennsylvania law.

9. To the best of your knowledge, does this substance have the potential for being substituted for, or used with other drugs to provided a mind-altering effect?* Yes, as a major immediate chemical precursor to Methamphetamine and Amphetamine

10. Are these abused recent or do they have a long history? Long history

11. Is there a danger to the health of users? Are you aware of injuries or death due to use of this substance? Can you describe or give examples?* Yes, when made into Methamphetamine and Amphetamine.

12. Does this substance cause physical dependence? Not in its self.

13. Do you have any basis for concluding that illegal trafficking or diversion of this substance occurs frequently?* Yes.

* Additional information may be attached.

Admit completed form, or a reasonable copy to: Pennsylvania Department of Health
Drug, Device and Cosmetic Board
Post Office Box 90
Harrisburg, Pennsylvania 17120

PENNSYLVANIA DRUG, DEVICE AND COSMETIC BOARD

PENNSYLVANIA DEPARTMENT OF HEALTH
Post Office Box 90
Harrisburg, Pennsylvania 17120
Phone: 717-787-2307

PETITION TO SCHEDULE CONTROLLED SUBSTANCES

The Secretary of Health has been granted the authority to control by regulation, substances which are subject to abuse; upon his own motion or on the petition of any interested party. Such action to control would limit legal distribution and place severe penalties upon illicit trafficking in such substances. Before so doing the Secretary must request the written advise of the Drug, Device and Cosmetic Board and shall consider the following facts surrounding a substance:

(1) Its actual or relative potential for abuse

(2) Scientific evidence of this pharmacological effect, if known

(3) State of current scientific knowledge regarding the substance

(4) Its history and current pattern of abuse

(5) The scope, duration, and significance of abuse

(6) The risk there is to the public health

(7) Its psychic or physiological dependence liability

(8) Whether the substance is an immediate precursor

(9) Whether the substance is an immediate precursor of a substance already controlled

This petition has been designed to bring about the rapid presentation of information to the Secretary and therefore initiate action to bring a substance under strict control if warranted. It is hoped

that individuals in the health professions, community groups and social agencies as well as the general public will make use of this important tool to bring substance abuses to the attention of the Secretary of Health and the Drug, Device and Cosmetic Board.

APPENDIX "G"

SUBJECT: Drug, Device and Cosmetic Board Activity

TO: All Board Members

FROM: Jack B. Ogun, R.Ph.
Administrative Secretary
Drug, Device and Cosmetic Board

Please find enclosed a copy of the proposed minutes to the Drug, Device and Cosmetic Board meeting of June 30, 1980. We are also requesting your written confirmation on the enclosed ballot for the scheduling of phenylacetone as recommended by the Board.

Please check the appropriate square, sign, date and return in the enclosed envelope so that the Secretary of Health can initiate the necessary action.

Your participation and cooperation in these activities are appreciated.

JBO:dag

Enclosures

July 15, 1980

DRUG, DEVICE AND COSMETIC BOARD

PHENYLACETONE BALLOT

Pursuant to the requirements of Section 3 under the Controlled Substance Drug, Device and Cosmetic Act, we are requesting the advise of the Drug, Device and Cosmetic Board in writing as to whether the substance phenylacetone shall be recommended to the Secretary as a Schedule II controlled substance.

_____ I hereby recommend to the Secretary of Health that phenylacetone be added to the Schedule II controlled substance list as having a high potential for abuse when used as an immediate precursor, and to conform with the findings of the U.S. Drug Enforcement administration with which I concur.

_____ I do not recommend that inclusion of phenylacetone as a Schedule II controlled substance.

COMMENT: _____

_____

_____ _____

DATE SIGNATURE

Mr. Ogun then noted the requests that had been received from the Bureau of Drug Control to place the drug phenylacetone in Schedule II. The Federal Drug Enforcement Administration has placed the substance in this category.

Roger Pilotti was then invited to comment. He explained his reasons for requesting placement of phenylacetone as a controlled substance under Act 64. It would conform with Federal Law, and not place extra burdens on manufacturers who have legitimate uses for the chemical. The only thing we are attempting to prevent is the illicit manufacture of amphetamines with the chemical. This has been a tremendous problem recently. We have found illegal producers that have located in rural areas of Pennsylvania on farms. They produce their own electricity, have

their own wells, and can produce many of their own resources. The Bureau has many legal problems when they come across a laboratory. In 1975 there were three. In 1976 there were four. Recently, the problem has spread throughout the U.S. It is important that the Board review this issue and hopefully, in it's wisdom, recommend scheduling the substance.

Dr. Krechmer made the motion to place phenylacetone as a Schedule II controlled substance.

Dr. Weiss seconded.

The question was asked if it is used in legitimate industry.

Dr. Weiss noted the action wouldn't have any effect on legal use. Violations under State Law are issued to those who are not licensed.

Roger Pilotti stated that they cannot control chemicals properly if they are not scheduled as controlled substances. It was noted that any criticism of the issue would come to the Department after publication as a proposal in the Pennsylvania Bulletin.

The motion to recommend phenylacetone as a Schedule II controlled substance was unanimously adopted.

Mr. Ogun then asked if any members have comments on the marijuana project.

Dr. Weiss indicated he was under the impression that when we had the open meeting, we were going to look for funding and moving ahead with prototype study.

Mr. Ogun noted that it took time for a

protocol to be developed, and there were also changes within the Department prior to Dr. Muller's appointment as Secretary. The State's drug firms might be interest in funding a study; however, no one has indicated any such plans. Marijuana is such a disreputable drug, that neither industry or State Government are excited at this point. We have inquired at the National Institutes of Health and are continuing the search for a Federal grant.

Dr. Newman asked that while we are talking about this issue, has there been any attempt to summarize the results of other studies.